Supreme Court, U.S.
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In The

Supreme Court of the United States

HORTON HOMES, INC.,

Petitioner,

v.

GLORIA WHEELER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an African-American female plaintiff, in a civil lawsuit pending in a majority African-American jurisdiction, violated the Equal Protection Clause of the Fourteenth Amendment, as well as *Batson v. Kentucky* and its progeny, where she used five out of her seven peremptory challenges to strike 100% of the white prospective jurors from the jury panel, thus leaving a 100% African-American jury, where many of the explanations cited by the Plaintiff's attorneys in support of the strikes were not supported by, and in some instances were actually contradicted by, the record of *voir dire*, and where the Plaintiff exercised strikes based upon classifications which bore no relation to the case to be tried and which resulted in a disparate impact upon white veniremembers.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties appear in the caption of the case on the cover page.

Petitioner Horton Homes, Inc. is a wholly owned subsidiary of Horton Industries, Inc. Horton Industries, Inc. is a privately held corporation and there is no publicly held corporation that owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The original decision of the Supreme Court of Alabama which the petitioner is asking this Court to review appears at Appendix A and is not reported. The subsequent order denying a timely Application for Rehearing appears at Appendix B and is not reported.

JURISDICTIONAL BASIS

The original judgement of the Supreme Court of Alabama was entered on February 22, 2002. A copy of that decision appears at Appendix A. A timely Application for Rehearing was denied on June 14, 2002. A copy of the order denying rehearing appears at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

The Fourteenth Amendment to the United States Constitution is set forth at Appendix C.

STATEMENT OF THE CASE

This case arises out of the Plaintiff's purchase of a manufactured home. On or about December 8, 1999, Gloria Wheeler, an African-American female, filed the

instant lawsuit in the Circuit Court for Bullock County, Alabama, against Factory Direct Homes, Inc.[1] and Horton Homes, Inc.[2] alleging various causes of action including breach of warranty, negligent and/or wanton repair, setup or installation, breach of implied warranty of merchantability, breach of implied warranty of habitability, and revocation of acceptance. C. 5-12.[3] Plaintiff later amended her complaint to add a count for violation of the Magnuson-Moss Warranty Act. C. 21-23.

The jurisdiction in which the lawsuit was filed, Bullock County, Alabama, is a majority African-American jurisdiction. According to year 2000 census figures, Bullock County has a population of approximately 11,502. Of that population, 73.1% are African-American while 23.6% are white. It is also important to note that the census figures show that only 3,299 persons, or 28.6% of the population in Bullock County, have a high school education, while only 676 persons, or 0.0587% of the population in Bullock County, have a college education. *U.S. Census*, 2000.

Jury selection was conducted on April 24, 2001. R. 5;[4] C. 230. The jury panel from which the jury of this case was chosen consisted of 26 individuals – 21 African-Americans and 5 whites. App. F, 14f-15f; App. I, 1i. Thus, the composition of the jury venire was approximately 81%

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[1] Factory Direct Homes, Inc. ("Factory Direct") was the dealership that sold the home. Factory Direct has no legal affiliation with Horton Homes, Inc. and is not a party to this petition.

[2] Horton Homes, Inc. was the manufacturer of the home in question. Horton Homes, Inc. is referred to throughout this petition as "Horton Homes," "Horton," "Petitioner" and "Defendant."

[3] Citations to "C." refer to the Clerk's Record.

[4] Citations to "R." refer to the Reporter's Transcript.

African-American and 19% white. The parties were each given seven peremptory strikes to use during the jury selection process. App. I, 2i. Plaintiff used five of her seven strikes to strike all five white veniremembers from the jury panel. App. F, 14f-21f; App. I, 2i. The resulting jury was 100% African-American. App. F, 14f-15f; App. I, 1i-2i.

At the conclusion of jury selection, counsel for Defendant made a *Batson* motion. App. F, 14f. The trial court held a hearing on Defendant's motion wherein Defendant presented a prima facie case of discrimination, and the court then required the Plaintiff to present race-neutral reasons for each of her strikes. App. F, 14f-21f. As will be seen below, many of the Plaintiff's explanations for her strikes are not supported by the record of *voir dire*, and in several instances, the justifications cited by the Plaintiff are actually contradicted by the record of *voir dire*. App. F, 14f-21f. Additionally, the Plaintiff struck three jurors on the basis that they had a "lawyer in the family," where there was no showing by the Plaintiff that such a classification bore any relation to the case to be tried. A summary of the rationale presented for each of the Plaintiff's strikes, as well as the *voir dire* testimony supporting and/or contradicting said strikes is presented below:

Plaintiff's First Strike – William Baxter Pickett, Jr.

The Plaintiff's first strike was William Baxter Pickett, Jr., a white male. App. F, 15f-16f; App. I, 1i-2i. The reason given for Mr. Pickett's strike was that counsel for Plaintiff "sued his aunt" and that "[Mr. Pickett] pulled a gun on [Mr. Jinks, Plaintiff's counsel]." App. F, 15f-16f.

However, none of this information was supported by *voir dire*. R. 5-137.[5]

Plaintiff's Second Strike – Thomas Lamar Phillips

The Plaintiff's second strike was Thomas Lamar Phillips, a white male. App. F, 16f-18f; App. I, 1i-2i. Mr. Phillips is an Alabama State Trooper. The reason given for his strike was that he was "very assertive" in the courtroom, and that he was directing other jurors what to do and "basically acting as a bailiff." App. F, 16f-17f. Counsel for plaintiff also stated that "Trooper Phillips has given numerous tickets to drivers of Terry Daniels[6] husband and made comments to [the driver's] that [Ms. Daniels] can get them fixed and seemed resentful of her role as a lawyer." App. F, 17f.

As to the issue of Trooper Phillips' alleged assertiveness, counsel for Defendant stated on the record that he did not notice any assertiveness on behalf of Trooper Phillips (App. F, 17f), and there is no evidence in the record regarding Trooper Phillips' alleged behavior other than the subjective observations of Plaintiff's counsel. R. 5-137. The trial judge never indicated whether he noticed the same type of behavior, and the trial court made no findings of fact whatsoever as to Trooper Phillips' alleged behavior. App. F, 14f-21f.

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[5] "R. 5-137" refers to the entire record of *voir dire*.

[6] Terry Daniels is a member of the law firm that represented the Plaintiff, Jinks, Daniels, Crow & Seaborn, and was present during *voir dire*, but did not participate in the trial of this case.

As to the issue of tickets, there was no information developed during *voir dire* to substantiate Plaintiff's assertion that Trooper Phillips did, in fact, issue tickets "to the drivers of Terry Daniels' husband," or that Trooper Phillips was resentful of Ms. Daniels' role as a lawyer. R. 5-137.

Plaintiff's Third Strike – Maryanna May

The plaintiff's third strike was Maryanna May, a white female. App. F, 18f-19f; App. I, 1i-2i. The primary reason given for her strike was that she has "a lawyer in the family." Counsel for Plaintiff also asserted that she is a "vice president at a bank" and stated that, "it is always when I am representing the plaintiff in a civil case, I always strike people that will work for insurance companies or people who are officers at banks." App. F, 18f. Counsel for Plaintiff further added that, "Maryanna May's father is the editor of the Union Springs Herald. And the most scathing of (sic) jury verdicts I have ever read was written by her father and published in this paper in this hometown. And I think the address she gave for her residence is his address. I think she lives with her father." App. F, 19f.

At *voir dire*, Ms. May did state that her "cousin" is a lawyer. App. F, 13f. Ms. May identified her cousin/lawyer as being one Paul May, who practices law in Union Springs, Alabama. App. F, 13f. However, Paul May was not involved in any way in the litigation of this case, and, in fact, was not involved in any way with any of the cases on the docket for which *voir dire* was being conducted. R. 5-137.

As to Ms. May's employment, there is nothing in the record to suggest that Ms. May is a "vice president at a bank."[7] R. 5-137.

Additionally, there was no information developed at *voir dire* to indicate that Ms. May's father is editor of the Union Springs Herald. R. 5-137. Further, there was certainly no information developed at *voir dire* regarding the subject matter of any article allegedly written by Ms. May's father, or whether Ms. May shared her father's alleged views regarding jury verdicts. R. 5-137. Indeed, Ms. May sat through an intense line of questioning regarding jury verdicts and punitive damages, and never indicated that she could not follow the law in regards to awarding damages. App. F, 1f-5f. Finally, there was no information elicited at *voir dire* that Ms. May lives with her father. R. 5-137.

Plaintiff's Fourth Strike – Kenneth Scott

The plaintiff's fourth strike was Kenneth Scott, a black male, who also responded that he has "a lawyer in the family." App. F, 18f-19f; App. I, 1i-2i.

Plaintiff's Fifth Strike – Donna Brooks Riley

Plaintiff's fifth strike was Donna Brooks Riley, a white female. App. F, 18f-20f; App. I, 1i-2i. The primary

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[7] At the initial stage of the *voir dire*, the trial court instructed each of the jurors to stand in turn and state their name, place of employment, spouse's name, etc. However, this information was not taken down by the court reporter and is thus not included in the Record on Appeal. Nevertheless, the prospective jurors would not have been asked to state their position at work, i.e., "vice president."

reason given for Ms. Riley's strike was also that she has a "lawyer in the family." App. F, 18f. However, this rationale is directly contradicted by the testimony elicited at *voir dire*. When the question was asked at *voir dire* whether anyone had a lawyer in the family, Ms. Riley did ***not*** respond. App. F, 13f. At the *Batson* hearing, counsel for Plaintiff postulated that because Ms. Riley was related to Ms. May, another white female juror previously struck by the Plaintiff, and Ms. May had responded that she has a lawyer in her family, then Ms. Riley must also have a lawyer in the family. App. F, 18f-20f. This theory, however, is also directly contradicted by the *voir dire* testimony. When the question was asked at *voir dire* whether anyone was related to anyone else in the venire, Ms. Riley responded only that "Lenita Hall" was her aunt. App. F, 12f. Ms. May, in turn, did not respond to the question.[8] App. F, 12f.

Plaintiff's fall-back position as to Ms. Riley was stated as follows: "[i]n any case, the fact that one juror is related to another juror that we chose to strike [i.e., Ms. May] is a race neutral reason." App. F, 20f. This argument again ignores the fact that Ms. Riley did not respond that she was related to Ms. May. App. F, 12f. It also ignores the fact that, in Alabama, veniremembers have no way of knowing which attorneys struck which veniremembers.[9] The Plaintiff later abandoned this argument on appeal.[10]

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[8] An unidentified prospective juror stated, "Lenita Hall and Maryanna May, all three of us are kin." App. F, 12f. It is unclear from the record who made this statement, and it is further unclear what degree of kinship these ladies might share.

[9] In Alabama, attorneys strike veniremembers by calling out a number assigned to the veniremember. The veniremembers have no way of knowing what number is assigned to them.

[10] See Appellee's Brief to the Supreme Court of Alabama, pp. 14-16.

Plaintiff's Sixth Strike – Thomas O'Hara, Jr.

The plaintiff's sixth strike was Thomas O'Hara, Jr., a white male. App. F, 20f; App. I, 1i-2i. The reason given for Mr. O'Hara's strike was that he was "formerly employed" with "CEAC," which was allegedly involved in a "great deal of litigation," and that Mr. O'Hara did not respond to that question when asked at *voir dire*. App. F, 20f. There is no information in the record that Mr. O'Hara ever worked for CEAC, or that CEAC was involved in a "great deal of litigation." R. 5-137. Further, there was no information adduced at *voir dire* that Mr. O'Hara had any knowledge of any alleged litigation against CEAC, or that he participated in any way in any alleged litigation. R. 5-137. Indeed, when counsel for Plaintiff asked the question at *voir dire* whether any member of the venire had ever been sued or ever worked for a company "that's being sued," Mr. O'Hara did not respond. App. F, 11f. Counsel for Plaintiff argued at the *Batson* hearing that the fact that Mr. O'Hara did not respond to this line of questioning simply goes to show his "inattentiveness." App. F, 20f.

Plaintiff's Seventh Strike – Warran Elliot Streeter

Plaintiff's final strike was Warren Elliot Streeter, a black male. App. F, 20f; App. I, 1i-2i.

The trial court found each of the Plaintiff's strikes to be race-neutral. App. F, 14f-21f. Thereafter, the jury was empaneled and instructed to return on May 7, 2001, for the trial of the case. App. F, 21f. The case was tried on May 7-8, 2001. C. 230. On May 8, 2001, the jury returned a verdict in favor of the Plaintiff and against both Factory Direct Homes, Inc. and Horton Homes, Inc., and assessed damages in the amount of $450,000.00. App. E, 1e. On

May 9, 2001, the trial court entered judgment on the jury verdict. App. D, 1d-2d.

Thereafter, on June 18, 2001, Horton filed a timely notice of appeal to the Supreme Court of Alabama. On appeal, Horton argued that Plaintiff violated *Batson* and its progeny in striking all five white veniremembers from the jury. App. G, 1g-4g. On February 22, 2002, the Supreme Court of Alabama affirmed the judgment of the trial court, without opinion. App. A. Horton then filed a timely Application for Rehearing wherein Horton limited its argument exclusively to the *Batson* issue. App. H, 1h-4h. Horton's Application for Rehearing was denied by the Supreme Court of Alabama on June 14, 2002. App. B.

This Petition for Writ of Certiorari follows.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE PLAINTIFF'S USE OF FIVE OUT OF HER SEVEN PEREMPTORY CHALLENGES TO STRIKE ALL FIVE WHITE PROSPECTIVE JURORS, THUS LEAVING A 100% AFRICAN-AMERICAN JURY, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AS WELL AS *BATSON v. KENTUCKY* AND ITS PROGENY.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a prosecutor in a criminal case from exercising her peremptory challenges in a racially discriminatory manner. Subsequent case law has extended this principle to apply to virtually all parties in both criminal and civil cases.

Powers v. Ohio, 499 U.S. 400 (1991) (holding that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and jurors share the same race); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that the use of peremptory challenges by private litigants in a civil case to exclude jurors on account of race violates the equal protection rights of the challenged jurors); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that equal protection clause forbids discrimination in use of peremptory strikes on basis of gender).

Although a defendant has no right to a "petit jury composed in whole or in part of persons of [the defendant's] own race," he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria. *Powers* at 404 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880)); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994).

In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), this Court stated that "[s]ince *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Id.* at 128 (citing *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992)).

A. The Ultimate Outcome of this Case Turns Upon Step Three of the *Batson* Analysis.

In *Batson* and its progeny, this Court outlined and refined a three-step process for evaluating claims that a litigant has violated the Equal Protection Clause of the Fourteenth Amendment by exercising peremptory challenges in a racially discriminatory manner. *Batson* at 96-97; *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (summarizing the three-step process); *Purkett v. Elem*, 514 U.S. 765, 767-768 (1995) (also summarizing the three-step process). First, the opponent of the strike(s) must make a prima facie showing of racial discrimination in the proponent's use of peremptory challenges. *Batson* at 96-97; *Hernandez* at 358; *Purkett* at 766. This showing may be based solely on evidence of the litigant's exercise of peremptory challenges at the trial of the case. *Batson* at 96.

Second, once the defendant makes a prima facie showing, the burden shifts to the proponent of the strike to come forward with a race-neutral explanation for challenging the excluded jurors. *Batson* at 97; *Hernandez* at 358-359; *Purkett* at 766. However, this Court has held that this second step of the process does not demand an explanation that is persuasive, or even plausible. *Purkett* at 768. A neutral explanation in the context of step two of the analysis means simply an explanation based on something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion) (O'CONNOR, J., concurring in judgment). "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*; see also, *Purkett* at 768.

Third, the trial court must then determine whether the opponent of the strike has established purposeful discrimination. *Batson* at 98; *Hernandez* at 359; *Purkett* at 766. It is at this third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Purkett* at 768 (citing *Batson* at 98; *Hernandez* at 359 (plurality opinion)). At this stage, "implausible or fantastic justifications may (***and probably will***) be found to be pretexts for purposeful discrimination." *Purkett* at 768 (emphasis added).

It is at this third stage of the inquiry that the case at hand is to be resolved. The first two steps of the inquiry are clearly met here. First, the Defendant established a prima facie case of discrimination based solely upon evidence of the extreme racial disparity in the Plaintiff's exercise of her peremptory challenges. App. F, 14f-15f. Second, counsel for Plaintiff offered presumptively race-neutral reasons for each of the strikes. App. F, 14f-21f. Further, this Court has held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991). Thus, the ultimate issue in this case turns upon whether the trial court correctly ruled upon the merits of Defendant's *Batson* motion at stage three of the inquiry.

B. The Trial Court Failed to "Undertake a Sensitive Inquiry" and to Consider "All Relevant Circumstances" in Evaluating the Rationale for Plaintiff's Strikes.

In *Batson*, this Court stated as follows:

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose.

Batson at 96-97.

The *Batson* Court also stated that "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

In the case at hand, the trial court clearly failed to take into account overwhelming evidence of intentional and purposeful race-based discrimination on behalf of the Plaintiff. Such evidence takes on a variety of forms in this case: evidence of the extreme racial disparity in the Plaintiff's exercise of her peremptory strikes, evidence of strikes based upon explanations that are directly contradicted by the testimony adduced at *voir dire*, evidence of strikes based upon classifications which bore no relation to

the case to be tried and which resulted in a disparate impact upon white veniremembers, evidence of strikes based upon explanations that are simply not supported by the testimony adduced at *voir dire*, and evidence of implausible or nonsensical justifications that are simply too fantastic to be believed.

1. The Trial Court Failed to Consider Evidence of the Extreme Racial Disparity in the Plaintiff's Exercise of Her Peremptory Strikes.

This Court has observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Batson* at 93 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976) (quoting *Akins v. Texas*, 325 U.S. 398, 404 (1945)). For example, "***total or seriously disproportionate exclusion of Negroes from jury venires, is itself such an 'unequal application of the law . . . as to show intentional discrimination***.'" *Id.* (emphasis added) (some internal citations and quotation marks omitted); see also *Hernandez v. New York*, 500 U.S. 352, 375 (1991) (O'CONNOR, J., concurring in the judgment) (noting that "[d]isproportionate effect may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination."). Additionally, this Court has also stated that the opponent of the strike(s) "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits

'those to discriminate who are of a mind to discriminate.'" *Batson* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

In the case at hand, the jury panel consisted of 26 individuals – 21 of whom were African-American and 5 of whom were white. App. I, 1i. The composition of the jury venire was thus approximately 81% African-American and 19% white. Counsel for Plaintiff used five of their seven peremptory strikes to eliminate 100% of the white prospective jurors from the jury. App. F, 14f-21f; App. I, 2i. The resulting jury was 100% African-American. App. I, 1i-2i. Such an extreme racial disparity cannot be explained on non-racial grounds, and, as stated in *Batson*, such a "pattern" of strikes gives rise to an "inference of discrimination." *Batson* at 96-97.

2. The Trial Court Failed to Consider Evidence That Many of the Plaintiff's Proffered Explanations for Her Strikes Were Directly Contradicted by the Testimony Adduced at *Voir Dire*.

There are numerous examples where the proffered reasons for the Plaintiff's strikes were directly contradicted by the testimony elicited at *voir dire*.

a. Plaintiff's Fifth Strike – Donna Brooks Riley

Perhaps the most obvious example of where the proffered justification for a strike conflicts with the testimony adduced at *voir dire* is that of Plaintiff's fifth strike, Donna Brooks Riley. The primary explanation given for Ms. Riley's strike was that she has a "lawyer in the family." App. F., 18f. However, this rationale is clearly contradicted by the

voir dire testimony. When the question was asked at *voir dire* whether anyone was related to a lawyer, Ms. Riley did ***not*** respond. App. F., 13f. At the *Batson* hearing, counsel for Plaintiff surmised that because Ms. Riley was related to Ms. May, and Ms. May had responded that she has a lawyer in her family, then Ms. Riley must also have a lawyer in the family. App. F., 18f-20f. However, this theory is also directly contradicted by the testimony adduced at *voir dire*. At *voir dire*, when the question was asked whether anyone was related to anyone else in the venire, Ms. Riley responded only that "Lenita Hall" was her aunt. App. F., 12f. Ms. May, in turn, did not respond to the question. App. F., 12f. In short, Ms. Riley did ***not*** respond that she was related to Ms. May, and Ms. May did ***not*** respond that she was related to Ms. Riley.

Counsel for Plaintiff argued on appeal that Ms. Riley's strike is given credence by the fact that the trial court acknowledged a relationship between Ms. May and Ms. Riley. App. F, 18f.[11] However, the issue during the *Batson* hearing was not whether Ms. Riley and Ms. May were related, but rather whether Ms. Riley was related to a lawyer. The trial judge certainly never acknowledged that he had any personal knowledge regarding whether ***Ms. Riley had a lawyer in her family.*** At the *Batson* hearing, counsel for Defendant pointed out that, even assuming Ms. Riley and Ms. May are related, it could very well be that Ms. May has an attorney on her side of the family whereas Ms. Riley does not. App. F, 18f. "An inlaw to one is not an inlaw to the other." App. F, 18f. Moreover, the fact that the trial judge was willing to acknowledge a relationship between Ms. May and

[11] See Appellee's Brief to the Supreme Court of Alabama, pp. 14-16.

Ms. Riley, but kept quiet on the issue of whether Ms. Riley was related to Ms. May's cousin/lawyer, certainly seems to indicate that the judge had no information as to whether Ms. Riley was in fact related to Ms. May's cousin/lawyer. The simple fact of the matter is that when Ms. Riley was asked whether she had a lawyer in the family she did not respond.

A simple question directed to Ms. Riley at *voir dire* would have dispelled any doubt regarding whether she had a lawyer in the family. Counsel for Plaintiff had the opportunity to ask questions of the venire ***after*** the question concerning lawyers in the family had been asked by another attorney. App. F, 12f, 14f. Thus, if there was any confusion regarding whether Ms. Riley had a lawyer in the family, and assuming that this was an area of legitimate concern for the Plaintiff, counsel for Plaintiff had the opportunity to engage Ms. Riley regarding her relationship to Ms. May's cousin/lawyer. However, counsel for Plaintiff chose not to do this. Certainly, the failure of the Plaintiff to engage in any meaningful *voir dire* on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination. *Batson* at 97 ("[t]he prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."); *Edmonson* at 631 ("[a]nd if a litigant believes that a prospective juror harbors the same biases or instincts, the issue can be explored in a rational way . . . "); *J.E.B.* at 143-144 ("*[v]oir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.").

Moreover, the trial court could have simply summoned Ms. Riley and questioned her as to whether she was, in fact, related to a lawyer. *Batson* at 95 ("[w]hen circumstances suggest the need, the trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors in the particular case.'") (citing *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972)). However, the trial court did not undertake such an inquiry.

b. Plaintiff's Sixth Strike – Thomas O'Hara, Jr.

Another obvious example of where the Plaintiff's proffered justification for a strike conflicts with the testimony adduced at *voir dire* is that of Plaintiff's sixth strike, Thomas O'Hara, Jr., a white male. App. F, 20f. The explanation given for Mr. O'Hara's strike was that he was "formerly employed" with "CEAC," which was allegedly involved in a "great deal of litigation," and that Mr. O'Hara did not respond to that question when asked at *voir dire*. App. F, 20f. First, there is no information in the record that Mr. O'Hara ever worked for CEAC, or that CEAC was involved in a "great deal of litigation." R. 5-137. Further, there is certainly no information that Mr. O'Hara had any knowledge of any alleged litigation against CEAC, or that he participated in any way in the alleged litigation. R. 5-137. Indeed, when counsel for Plaintiff asked the question whether any member of the venire had ever been sued or ever worked for a company "that's being sued," Mr. O'Hara did ***not*** respond. App. F, 11f. Counsel for Plaintiff argued at the *Batson* hearing that the fact that Mr. O'Hara did not respond to this line of questioning goes to show his "inattentiveness." App. F, 20f.

In this situation, as before with Ms. Riley, counsel for Plaintiff asserts, in essence, that they have information superior to that of the juror himself. However, based on the information adduced at *voir dire*, it is entirely possible that Mr. O'Hara never worked for CEAC, or that he did not work for CEAC at the time they were allegedly being sued, or that he had no knowledge regarding CEAC being sued. Also, based upon the information in the record, there is no evidence that CEAC was even sued, or if so, by whom. Finally, there is no evidence in the record that Mr. O'Hara had any knowledge regarding counsel for Plaintiff's alleged participation in any alleged litigation against CEAC.

As before with Ms. Riley, assuming this was an area of legitimate concern for the Plaintiff, a simple question directed to Mr. O'Hara at *voir dire* would have cleared up any question regarding whether Mr. O'Hara worked for CEAC, or whether he had knowledge of any alleged lawsuits against CEAC. Certainly, if counsel for Plaintiff had some information that Mr. O'Hara should have had a response to this line of questioning, they had a duty to engage him at *voir dire*. *Batson* at 97 ("[t]he prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."); *Edmonson* at 631 ("[a]nd if a litigant believes that a prospective juror harbors the same biases or instincts, the issue can be explored in a rational way . . . "); *J.E.B.* at 143-144 ("*[v]oir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently"). Again, as before with Ms. Riley, counsel for Plaintiff chose not to question Mr. O'Hara.

3. The Trial Court Failed to Consider Evidence of Disparate Impact.

This Court has held that evidence of disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent. *Hernandez v. New York*, 500 U.S. 352, 362 (1991). "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). "If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." *Hernandez* at 363.

a. The Classifications Created by the Plaintiff Resulted in a Disparate Impact upon White Veniremembers.

In the case at hand, Plaintiff struck three potential jurors on the grounds that they had "lawyers in the family." App. F, 18f-21f. Of those three, two – Maryanna May and Donna Brooks Riley – were white; while only one – Kenneth Scott – was African-American. App. I, 1i. In addition, a supplemental basis proffered by Plaintiff's counsel to strike Maryanna May was that she was "an officer at a bank." App. F, 18f. Clearly, these classifications served as a discriminatory basis to strike more whites than African-Americans.

It is an unfortunate reality that, at this stage of racial equality in the State of Alabama, a majority of professionals, such as lawyers, doctors, officers at banks, etc., are

white, even in a majority African-American jurisdiction such as Bullock County, Alabama. This is evidenced not only by the 2000 census figures cited previously, but also by statistics released by the Alabama State Bar which indicate that only 5.1% of lawyers in Alabama are African-American (App. J, 1j), and of the twelve (12) practicing attorneys in Bullock County, Alabama, only two (2) are African-American. App. J, 2j. Thus, based upon these statistics, it is extremely likely that, when the question is asked in Bullock County, Alabama whether anyone is related to a lawyer, a greater proportion of whites than African-Americans will respond.

It is clear, therefore, that the classification created by the Plaintiff of having a "lawyer in the family" served as an invalid basis to allow the Plaintiff to strike more whites than African-Americans. Specifically, it served as an invalid basis to strike two whites as opposed to one African-American.

Similarly, the classification of being "an officer at a bank" served as a invalid basis to strike one white as opposed to no African-Americans.

a. The Classifications of Having "A Lawyer in the Family" and Being an "Officer at a Bank" Bore No Relation to the Case to Be Tried.

In *Batson*, this Court stated that the proponent of the strike "must articulate a neutral explanation ***related to the particular case to be tried***." *Batson* at 98 (emphasis added). However, this Court in *Purkett* seems to have abandoned any reliance on this language as it relates to step two of the *Batson* inquiry. *Purkett* at 768-769. However, the requirement that the explanation be related to

the particular case to be tried should not be abandoned as to step three of the process. See, e.g. *Hernandez* at 370-371 (wherein the Court explained that a trial court could find pretext based on nothing more than a consistent policy of excluding all Spanish-speaking jurors if that characteristic was entirely unrelated to the case to be tried.) (Plurality opinion of KENNEDY, J.). In this regard, Petitioner urges this court to revisit and redefine its holding in *Purkett*. If strikes based upon meaningless classifications which bear no relation to the case to be tried are to be allowed, the procedures put in place by *Batson* "will amount to nothing more than a meaningless charade." *Purkett* at 777 (STEVENS, J., with whom BREYER, J. joins, dissenting).

In the case at hand, counsel for Plaintiff made no showing as to how having "a lawyer in the family" bears any relation to the underlying facts of this case. Nor did the trial court require that they make such a showing. Simply because Ms. May has a cousin who is a lawyer, and simply because Ms. Riley may, at best, be distantly related to the same lawyer (although she denies such a relationship), such a rationale has absolutely nothing to do with the underlying facts of this case.

Ms. May identified her cousin/lawyer as being one Paul May, who practices law in Union Springs, Alabama. App. F, 13f. However, Paul May was not involved in any way in the litigation of this case, and, in fact, was not involved in any way with any of the cases on the docket for which *voir dire* was being conducted. R. 5-137.

Similarly, as to Ms. May's employment, even assuming that Ms. May is a "vice president at a bank," counsel for Plaintiff offered no rationale as to why this alleged occupation bears any relation whatsoever to a breach of warranty case involving a mobile home. Instead, at the *Batson*

hearing, counsel for Plaintiff stated that, "***it is always*** when I am representing the plaintiff in a civil case, I ***always*** strike people that will work for insurance companies or people who are officers at banks." App. F, 18f (emphasis added). Certainly, this bold and outrageous admission on behalf of Plaintiff's counsel is indicative of the type of "invidious intent" consistently condemned by this Court in *Batson* and its progeny. *Batson* at 93.

4. The Trial Court Failed to Consider Evidence That Many of the Plaintiff's Proffered Explanations for her Strikes Were Not Supported by the Record of *Voir Dire*.

In addition to evidence that many of the Plaintiff's justifications for her strikes are contradicted by the testimony adduced at *voir dire*, as well as evidence of disparate impact, there are also numerous examples where many of the Plaintiff's justifications for her strikes are simply not supported by the record of *voir dire*.

a. Plaintiff's Second Strike – Thomas Lamar Phillips

A prime example of the Plaintiff's strikes not being supported by the record of *voir dire* is that of Plaintiff's second strike, Thomas Lamar Phillips, a white male. App. F, 16f-18f. Mr. Phillips is an Alabama State Trooper. The explanation given for his strike was that he was "very assertive" in the courtroom, and that he was directing other jurors what to do and "basically acting as a bailiff." App. F, 16f-17f. Counsel for plaintiff also stated that "Trooper Phillips has given numerous tickets to drivers of Terry Daniels' husband and made comments to them that

[Ms. Daniels] can get them fixed and seemed resentful of her role as a lawyer." App. F, 17f. None of this information is supported by the record. R. 5-137.

At the *Batson* hearing, counsel for Defendant stated on the record that he did not notice any assertiveness on behalf of Trooper Phillips (App. F, 17f), and there is certainly no evidence in the record regarding Trooper Phillips' alleged behavior other than the subjective observations of Plaintiff's counsel. R. 5-137. Certainly, the trial judge never indicated whether he noticed the same type of behavior, and the trial court made no findings of fact whatsoever as to Trooper Phillips' alleged behavior. R. 5-137. The Court bailiff was never questioned as to whether Trooper Phillips' behavior was inappropriate. R. 5-137. In short, there is absolutely no evidence in the record regarding Trooper Phillips' alleged behavior other than the bare allegations of Plaintiff's counsel. R. 5-137.

As to the issue of tickets, there was no information developed during *voir dire* to substantiate Plaintiff's assertion that Trooper Phillips did, in fact, issue tickets "to the drivers of Terry Daniels' husband" or that he was resentful of Ms. Daniels' role as a lawyer. R. 5-137. Again, had this been a legitimate area of concern for the Plaintiff, counsel for Plaintiff certainly could have directed a series of questions to the Trooper regarding his alleged bias against Ms. Daniels and her law firm, and again, counsel for Plaintiff chose not to do this.

b. Plaintiff's Third Strike – Maryanna May

A further example of the Plaintiff's strikes not being supported by the record of *voir dire* is that of the plaintiff's third strike, Maryanna May, a white female. App. F,

18f-19f. Again, the explanation given for her strike was that she had "a lawyer in the family" and that she was "a vice president at a bank." App. F, 18f. Counsel for Plaintiff also stated that, "Maryanna May's father is the editor of the Union Springs Herald. And the most scathing of (sic) jury verdicts I have ever read was written by her father and published in this paper in this hometown. And ***I think*** the address she gave for her residence is his address. ***I think*** she lives with her father." App. F, 19f (emphasis added).

At *voir dire*, while Ms. May did respond that her cousin was a lawyer (App. F, 13f), there was no information developed at *voir dire* that indicated that Ms. May is an "officer at a bank," or that Ms. May's father is editor of the Union Springs Herald. R. 5-137. Further, there was certainly no information developed at *voir dire* regarding the subject matter of any article allegedly written by Ms. May's father, or whether Ms. May shared her father's alleged views regarding jury verdicts. R. 5-137. Indeed, Ms. May sat through an intense line of questioning regarding jury verdicts and punitive damages, and never indicated that she could not follow the law in regards to awarding damages. App. F, 1f-5f. Finally, there was no information elicited at *voir dire* that Ms. May lives with her father. R. 5-137. Counsel for Plaintiff's assertion that ***he thinks*** Ms. May lives with her father was pure speculation.

Again, as before with the previous jurors, counsel for Plaintiff chose not to direct any *voir dire* to Ms. May regarding this area of alleged concern.

c. Plaintiff's First Strike – William Baxter Pickett, Jr.

A final example of the Plaintiff's strikes not being supported by the record of *voir dire* is that of the Plaintiff's

first strike, William Baxter Pickett, Jr., a white male. App. F, 15f-16f. The rationale given for Mr. Pickett's strike was that counsel for Plaintiff "sued his aunt" and "he pulled a gun on [Mr. Jinks, Plaintiff's counsel]." App. F, 15f-16f. None of this information is supported by the record. R. 5-137. Petitioner would concede that, if this information is true, this would serve as a valid reason for the strike. However, given that there is no independent verification for this information, and, in light of the dubious nature of Plaintiff's other strikes, the justification for the strike must be called into question.

5. The Trial Court Failed to Consider Evidence of "Implausible or Fantastic Justifications" for the Plaintiff's Strikes.

The Plaintiff's fall-back position for her strike of Donna Brooks Riley is indicative of the type of "implausible or fantastic justifications" this Court condemned in *Purkett*. *Id.* at 768. At the *Batson* hearing, after the parties argued over whether Ms. Riley was in fact related to Ms. May's cousin/lawyer, counsel for Plaintiff stated, "[i]n any case, the fact that one juror is related to another juror that we chose to strike is a race neutral reason." App. F, 20f. As stated previously, the Plaintiff later abandoned this argument on appeal.[12] Nevertheless, this argument is indicative of the Plaintiff's discriminatory intent in exercising her peremptory strikes. Arguably, the fact that two prospective jurors are related to each other would be a race-neutral reason to strike ***one*** of the related jurors.

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[12] See Appellee's Brief to the Supreme Court of Alabama, pp. 14-16.

However, the fact that one juror is related to another juror whom the Plaintiff has ***previously struck*** has no relevancy whatsoever. It is irrefutable that, in Alabama, jurors have no way of knowing which attorneys struck which jurors. For instance, if Ms. Riley had not been struck from the panel and remained on the jury, she would have had no way of discovering that it was counsel for Plaintiff who struck Ms. May. The Plaintiff's rationale, when taken to its logical extreme, would mean that any two or more related jurors would ***never*** make it on to a jury, simply because, by striking one of the relatives, the litigant would then be entitled to strike them all.

Such an incredible rationale has no place in our system of jury selection. This rationale, in and of itself, is overwhelming evidence of the Plaintiff's discriminatory intent in exercising her peremptory strikes.

C. The Underlying Rationale of Batson and its Progeny Supports a Reversal of this Case.

In developing the *Batson* line of cases, this Court has focused primarily upon the rights of the excluded jurors and the integrity of the judicial process, as opposed to the rights of the litigants themselves. This rationale has been repeated in case after case. For instance, in *Batson*, this Court stated:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply "is unrelated to his fitness as a juror.". . . . As long ago as *Strauder*, therefore, the

> Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. . . .
>
> ***The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community***. Selection procedures that purposefully exclude [certain] persons from juries ***undermine public confidence in the fairness of our system of justice*** . . . .

Batson at 87 (emphasis added) (internal citations omitted).

Similarly, in *Powers*, this Court stated that "[t]his Court has not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers* at 402; *Edmonson* at 628. The Court in *Powers* went on to state, "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." *Powers* at 411 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)); *Edmonson* at 630.

The rationale expressed in *Batson* and *Powers*, however, is certainly not limited to criminal courts. "Indeed, discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial." *Edmonson* at 618-619. "In either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice." *Id.*

In *J.E.B.*, when applying the *Batson* rationale to the exclusion of women, this Court again reiterated its rationale for protecting the rights of excluded jurors and the integrity of the courts:

> Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury ***will infect the entire proceedings***. See *Edmonson*, 500 U.S., at 628, 111 S.Ct., at 2087 (discrimination in the courtroom "***raises serious questions as to the fairness of the proceedings conducted there***"). The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and ***the inevitable loss of confidence in our judicial system*** that state-sanctioned discrimination in the courtroom engenders.

J.E.B. at 140 emphasis added.

In the case at hand, Plaintiff exercised her peremptory strikes in such a way as to clearly demonstrate her discriminatory intent. As illustrated above, the record is replete with instances where the Plaintiff exercised her strikes based upon contrived and implausible rationale which was not supported by, and in some instances directly contradicted by, the testimony at *voir dire*. The Plaintiff also exercised her strikes based upon nonsensical and illogical classifications which bore no relation to the case to be tried, and which resulted in a disparate impact upon white veniremembers. Indeed, the systematic exclusion of whites from this jury, when coupled with the ultimate jury award of a significant amount of money, "raises serious questions" regarding the fairness of this proceeding. Further, to uphold such strikes based upon the rationale offered by the Plaintiff would not only offend the

dignity of the excluded jurors, but also promote the erosion of confidence in our judicial system.

CONCLUSION

Based upon the foregoing, it is clear that the trial court erred in overrūling Defendant's *Batson* motion, thereby allowing the Plaintiff to strike five out of five white veniremembers from the jury panel. Thus, this matter is due to be reversed and remanded to the Circuit Court of Bullock County, Alabama for a new trial.

Respectfully submitted,

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APPENDIX A

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2001-2002

(Filed Feb. 22, 2002)

1001714

Horton Homes, Inc. v. Gloria Wheeler.

Appeal from Bullock Circuit Court, CV-99-252.

SEE, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Moore, C.J., and Brown, Harwood, and Stuart JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

[SEAL]

June 14, 2002

1001714

Horton Homes, Inc. v. Gloria Wheeler (Appeal from Bullock Circuit Court: CV-99-252).

ORDER

IT IS ORDERED that the application for rehearing filed in this cause is overruled.

Overruled – No Opinion

SEE, J. – Moore, C.J., and Brown, Harwood, and Stuart, JJ., concur.

APPENDIX C

The 14th Amendment to the Constitution of the United States provides, in pertinent part, as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

IN THE CIRCUIT COURT OF BULLOCK COUNTY, ALABAMA

GLORIA WHEELER, Plaintiff,	)	
vs.	)	CASE NO. CV-1999-252
FACTORY DIRECT HOME, INC.; HORTON HOMES, INC., Defendants.	)	

ORDER

Issue having been joined, this matter came on for trial commencing on May 7, 2001, at the Bullock County Courthouse in Union Springs, Alabama. Thereupon came a jury of good and lawful citizens, to-wit: Jimmy L. Sparks and eleven others, who being duly impaneled, sworn, and charged by the Court according to law, before whom the trial of this cause was entered upon and continued from day to day and from time to time, and upon the 8th day of May, 2001, said jurors upon their oaths did say:

> "We, the jury, find in favor of the Plaintiff and against:
>
> __X__ Factory Direct Homes, Inc.
>
> __X__ Horton Homes, Inc.,
>
> and assess damages in the amount of $450,000.00."

Thereupon, judgment is entered in favor of the Plaintiff, Gloria Wheeler, and against the Defendants, Factory Direct Homes, Inc., and Horton Homes, Inc., and damages are assessed in the amount of $450,000.00.

Dated this 9th day of May, 2001.

/s/ Burt Smithart
Burt Smithart,
Presiding Circuit Judge
Third Judicial Circuit
of Alabama

APPENDIX E

IN THE CIRCUIT COURT OF BULLOCK COUNTY, ALABAMA

GLORIA WHEELER,	)	
Plaintiff,	)	
	)	**CIVIL ACTION NO.**
-vs-	)	**CV-99-252**
FACTORY DIRECT HOMES, INC., HORTON HOMES, INC., et al.,	)	
Defendants.	)	

We, the jury, find in favor of the Plaintiff and against:

__X__ Factory Direct Homes, Inc.

__X__ Horton Homes, Inc.

and assess damages in the amount of $450,000.00.

/s/ Jimmy Sparks
Jury Foreperson

_____ We, the jury, find against the Plaintiff and in favor of Horton Homes, Inc.

_____
Jury Foreperson

_____ day of May, 2001.

APPENDIX F

[Excerpts From Reporters Transcript]

APPEAL

TO

Supreme Court of Alabama

FROM

Horton Homes_____

Appellant

vs.

Gloria Wheeler _____

Appellee

[28] MR. SMITH: Now I would like to ask, ladies and gentlemen, a few brief questions about your general prospective with regard to the legal system and how if you have an opinion that might be biased, I need to know. I will ask three or four particular [29] questions in this area. The first question is: Are there any of you who are members of or have relatives who are members of the BCA, the business council? Are there any of you who are members of the BCA or have relatives who are members?

Are any of you familiar with the plight of BCA and sympathize with the philosophy manifested in that plight?

Is there anybody here who is familiar with their plight, what they are about, and says to me, Mr. Smith, I sympathize with that?

(No response.)

MR. SMITH: Ladies and gentlemen, the next question I would like to ask is a very important question. Are there any of you who believe that there are too many lawsuits being filed or that there are too many large jury verdicts in Alabama and that Alabama is a jackpot justice state?

Is there anybody here if you search your heartbeat? No right or wrong answers. Anybody here who holds that feeling?

(No response.)

MR. SMITH: Is there anybody here who believes that jury verdicts – Let's talk about that for a minute, that jury verdicts themselves are – As [30] Judge Smithart has already stated, this is a case involving – a case brought by Willie Jordan involving breach of contract, fraud, and misrepresentation. Are there any of you who when you hear that word fraud say to yourself, I really don't want to serve on that jury because I don't believe that anyone can be defrauded in a transaction?

Under our system of law, the plaintiff – and we are the plaintiff – meaning we must prove our case to you by the evidence. Are there any of you, ladies and gentlemen, that if we prove our case to you based on the evidence to your reasonable satisfaction after the case is concluded – Are there any of you who do not feel you could render a verdict for the plaintiff for any reason even if we prove our case or otherwise. We have the burden. But if we prove our case, is there anyone here who could not render a verdict for the plaintiff?

Is there anyone here who feels they would have any sympathy with regard to Rental Village simply because Rental Village is located in Union Springs, Alabama?

Is there anybody here when you search your heartbeat, your inner man, inner self, and inner [31] woman you say to yourself, you know, Mr. Smith, they are here and I can't do it? That means something to me, I can't.

Is there anyone here who believes that when you make a contract with someone, a written agreement with someone that you draft, that you ought to be held to the agreement and honor every precept and principle contained within the four corners of that agreement?

Is there anybody here that does not believe that people ought to in general be held to honoring the four corners of the entirety of the agreement?

In this case, ladies and gentlemen, as Judge Smithart has indicated, there is a claim for fraud and misrepresentation. And so therefore, the plaintiff in this case is seeking two kinds of damages, compensatory damages to compensate and then punitive damages. I would like to ask you a few questions about punitive damages.

Punitive damages in our system of law are damages that are not orchestrated to compensate anybody. There are individual systems to punish wrongdoers and to stop wrongdoing in the future. That's the lawyer layman definition of it.

No that you have heard that definition of that [32] word, punitive damages, damages solely for the purpose of punishing a wrongdoer as to stop or police such conduct in the future, is there anybody here when they search their heartbeat, inner man or inner woman, says, Mr. Smith, I

don't believe punitive damages should be in our legal system; I don't think it should be part of the judicial system. And even though the plaintiff proved the case, I felt I could not return a verdict for punitive damages because I don't believe in them, Mr. Smith? I don't think they belong in the legal system. I think they are a sham and should be stricken.

Is there anybody in here that believes that punitive damages are a sham and should not be a part of our legal system?

(No response.)

MR. SMITH: In this case as Judge Smithart has indicated to you, plaintiffs are alleging that the defendants committed fraud with regard to the rental and ultimate purchase they say of a washer and dryer and that they were not allowed to exercise the buy-out clause earlier; they were not allowed to exercise it. In this case, the plaintiff will be asking for punitive damages.

[33] Now, I will be real honest with you up front because I believe that honesty is the best policy. It is the only policy. We will be asking for a substantial sum of money, and we will be asking for a very substantial sum of punitive damages.

Are there any of you just based on what you heard or for any reason personal to you or any reason that is contained within your firm, heartfelt belief that I am not going to render a verdict for punitive damages in this case even if Mr. Smith proves his case and I feel it could be necessary; I am not going to do it?

And further let me piggy-back that question and ask the same question to say this to you: Mr. Smith, I can't

consider rendering a substantial million dollars, multimillion dollar verdict in the case because it involves a washer and dryer; I can't do it. It doesn't matter if it is fraud; I ain't going to do it and can't do it in good conscious? It doesn't matter what you present and I am going to raise my hand right now and let you know right up front? Is there anybody here that feels that way? Just let me know.

* * *

[56] THE COURT: The plaintiffs in this case are represented by the firm of Jinks, Daniel, Crow and [57] Seaborn. All the lawyers are here. Mr. Jinks is one of the jurors and is on this panel. You want him excused?

MR. WHITE: Yes, sir.

THE COURT: Are any of you currently represented by any of the attorneys in that firm?

PROSPECTIVE JUROR: Christy Crow, Renia Owens.

THE COURT: And is she currently representing you, Ms. Owens?

PROSPECTIVE JUROR: Now she is, yes.

THE COURT: And it's going on right now?

PROSPECTIVE JUROR: Yes, sir.

PROSPECTIVE JUROR: Sharon Key. They used to represent me.

THE COURT: They used to?

PROSPECTIVE JUROR: Uh-huh.

THE COURT: And would that in any way affect your ability to be fair and impartial to both sides?

PROSPECTIVE JUROR: No.

THE COURT: You could be fair to Fleetwood of Georgia?

PROSPECTIVE JUROR: Yes.

[58] THE COURT: Thank you, ma'am.

Anybody else?

Let's expand the question. Has anybody at any time been represented by anyone in that firm?

PROSPECTIVE JUROR: Thomas O'Hara.

THE COURT: Would that affect your judgment and ability to be fair in this case?

PROSPECTIVE JUROR: No.

PROSPECTIVE JUROR: Thelma Smith.

THE COURT: Ms. Smith, would it affect your ability to be fair in this case?

PROSPECTIVE JUROR: No.

PROSPECTIVE JUROR: Ms. Fitzpatrick.

THE COURT: Same response as a while ago?

PROSPECTIVE JUROR: Yes.

PROSPECTIVE JUROR: In the past, they represented me. But it's all over now. It's a possibility that it may be.

THE COURT: It's possible it could affect your ability to be fair to Mr. White and his client?

PROSPECTIVE JUROR: Yes.

THE COURT: Thank you, Mr. Goshea.

Ms. Shakoor, you've been represented by them?

PROSPECTIVE JUROR: Ms. Daniels.

THE COURT: Would that affect your ability?

[59] PROSPECTIVE JUROR: No, sir, it would not.

THE COURT: You could put that aside and judge the case on the facts presented at trial only?

PROSPECTIVE JUROR: Yes.

PROSPECTIVE JUROR: Retha Ivey. Mr. Jinks has represented me in the past.

THE COURT: Would that affect your ability to be fair to both sides?

PROSPECTIVE JUROR: No.

PROSPECTIVE JUROR: Loretta Baskin. Mr. Jinks.

THE COURT: And, Ms. Baskin, would that affect your ability to be fair and impartial to both sides of this case?

PROSPECTIVE JUROR: No.

THE COURT: Thank you, ma'am.

Anybody else?

(No response.)

* * *

[64] THE COURT: Questions from the plaintiff.

MS. CROW: May it please the Court. Good morning. My name is Christy Crow, and I along with Lynn Jinks represent Ms. Whitton and Ms. Stewart in this case. Out of the four or five folks that said they had mobile homes, did any of you have any problems with your home?

PROSPECTIVE JUROR: Pamela Thorpe. When I first purchased it, the floor was squeaky, like off balance or something. The people that we got if from, we told them about it but they never did anything about it.

MS. CROW: They didn't ever fix it?

PROSPECTIVE JUROR: Huh-uh.

MS. CROW: Would the fact that you had problems with a Fleetwood home make you be unfair in this case?

PROSPECTIVE JUROR: I think it would, yes.

MS. CROW: How many of y'all – Is there anybody else that has any kind of mobile home that you had problems with?

PROSPECTIVE JUROR: James Colvin. We are [65] currently living in one that we have problems with. But it's a Avalon.

MS. CROW: Would that fact that you have problems with the mobile home cause you to be partial to the plaintiff or the defendant in this case?

PROSPECTIVE JUROR: Yes.

MS. CROW: Can you be impartial?

PROSPECTIVE JUROR: I don't think I could be fair because I'm having problems, too. They won't come out because I've called and called.

PROSPECTIVE JUROR: Sharon Key. I had problems in my mobile home.

MS. CROW: Did they get fixed?

PROSPECTIVE JUROR: Some of the things was not, but they had certain things sent out to get fixed. But the other things never got fixed.

MS. CROW: Would the fact that you are having problems or had problems with the home, would it affect your ability to be impartial in the case?

PROSPECTIVE JUROR: No, it would not.

MS. CROW: You could still be fair?

PROSPECTIVE JUROR: Yes.

PROSPECTIVE JUROR: Angela O'Brien. I had problems with my roof being cracked on the inside, [66] one of my outside doors. And they didn't hesitate coming out and taking care of it.

MS. CROW: Would the fact that you had problems and they came out and fixed it, would that affect your ability to be impartial in this case?

PROSPECTIVE JUROR: No.

MS. CROW: Have any of y'all ever worked for a mobile home or manufacturing home lot where they sell mobile homes?

Anybody ever worked for a manufactured homes manufacturer where they make the mobile homes? I don't think we have any around here. There are some in Georgia.

Do any of you have any family members that have ever worked for a manufacturing home lot and sold mobile homes?

Do any of you own or have you ever owned a business that manufactured products, whatever kind of product it was?

Have any of you ever owned a business that sold goods or products to the public?

Have any of you ever been sued?

Have any of you ever worked for a company or currently work for a company that's being sued?

PROSPECTIVE JUROR: Lenita Hall.

[67] MS. CROW: And you work for Bonnit Plant Farm?

PROSPECTIVE JUROR: Yes.

MS. CROW: Have you had to assist in that litigation in gathering documents?

PROSPECTIVE JUROR: Yes, ma'am.

MS. CROW: Would the fact that you had to assist in gathering documents for that litigation affect your ability to be fair and impartial in this case?

PROSPECTIVE JUROR: No, ma'am.

MS. CROW: Anybody else that's worked for a company or currently works for a company that's being sued?

PROSPECTIVE JUROR: Joyce Houston. I work with Bonnie Plant Farm.

MS. CROW: Have you had to assist in any litigation at all?

PROSPECTIVE JUROR: No.

PROSPECTIVE JUROR: Savannah Fitzpatrick. Bullock County Correctional Facility.

MS. CROW: Have you had to assist in any way in the litigation?

PROSPECTIVE JUROR: No.

MS. CROW: Do any of you currently make repairs on manufactured homes, any handy-man work?

[68] What is your name?

PROSPECTIVE JUROR: James Lane.

MS. CROW: Anybody else that's worked on doing carpentry work of any sort?

(No response.)

MS. CROW: Is there anybody here that believes that just because you buy a mobile home, you shouldn't have a home that's good quality because they're a little less expensive than a stick built house?

Does everybody believe that if you buy a mobile home and if you have problems, they should fix it?

(No response.)

MS. CROW: That's all.

* * *

[102] MR. LEE: Is anybody up here related to anybody else on the jury?

[103] Mr. Lane, who are you related to?

PROSPECTIVE JUROR: Regina Stewart.

PROSPECTIVE JUROR: Barbara Martin. I'm related to Annie Johnson.

PROSPECTIVE JUROR: Donna Riley, Lenita Hall is my aunt.

PROSPECTIVE JUROR: Lenita Hall and Maryanna May, all three of us are kin.

PROSPECTIVE JUROR: Regina Stewart. James Lane.

MR. LEE: Ms. Fitzpatrick is related to Loretta Baskin. And then I've got Mr. Goshea related to the other Mr. Goshea. And Ms. Johnson is related to Ms. Stewart.

PROSPECTIVE JUROR: Walter Harris. James Colvin.

PROSPECTIVE JUROR: Janice Bethune. Retha Ivey.

PROSPECTIVE JUROR: Juan Pritchett. Angela O'Brien and Elizabeth Bean.

* * *

[114] MR. MCGOWAN: Have you or any members of your family ever worked for a law firm or taken any law school courses?

PROSPECTIVE JUROR: Maryanna May. I have a cousin who is an attorney.

[115] MR. MCGOWAN: His name?

PROSPECTIVE JUROR: Paul May.

MR. MCGOWAN: Does he practice here in Union Springs?

PROSPECTIVE JUROR: Yes.

PROSPECTIVE JUROR: Kenneth Scott. Nephew.

* * *

[132] THE COURT: Anybody else related to or do you know Ms. Wheeler?

Ms. Wheeler is represented by Lynn Jinks and his firm, and we've already been through those questions. Anybody thought of a response that has not already been given?

(No response.)

* * *

[133] MR. JINKS: May it please the Court. Good afternoon. Judge Smithart and the other lawyers [134] have asked a lot of questions so I promise to be brief.

Judge Smithart asked you about two entities that are the defendants in this case, Factory Direct Homes, Incorporated and Horton Homes, Incorporated. And I think the response was that none of you had ever worked for either one of those corporations.

Do any of you know anyone, family member or friend, who has ever worked for either Factory Direct Homes or Horton Homes, Incorporated?

Do any do any of you know anything about either one of those companies?

Do any of you own or co-own any interest in any business that sells goods or provides service to consumers or have you ever been involved in that business that's owned or co-owned?

Thank you. That's all I have, Judge.

* * *

[137] THE COURT: Motions from the plaintiff?

MS. CROW: No motions.

THE COURT: Defendants?

MR. WHITE: Yes, Your Honor. We make a [Batson] motion.

THE COURT: Prima [facie] showing.

MR. WHITE: Of the twenty-six total jurors on the panel, of those, my calculations show that five were

white; the rest were African-American. According to my calculations, they struck all five of the white people from the jury.

THE COURT: Response from the plaintiff?

MS. CROW: That is a correct analysis of both the makeup of the venire, and we did strike the five [white] people. We would like to present them to the Court if you think that's appropriate.

MR. JINKS: Can I put something on the Record [138] before we start giving the race neutral strikes? Some of the reasons we strike people, black or white, is this is a small community and it is based on things that we know for a fact. Some of this involves personal relationships with me or members of my firm. Some of it would involve previous knowledge that I would have through an attorney/client relationship. We are prepared to disclose all of this to you and to the Court and [request] that this part of the Record be sealed and the references be by number of jurors instead of names. Is that agreeable?

MR. WHITE: Well, I think it would be up to the judge as to whether it is kept confidential or not. I don't have any objection to it being confidential. If it is in the Record on appeal, it would not be sealed. But otherwise –

MR. JINKS: Right.

THE COURT: Plaintiff's first strike.

MS. CROW: Our first strike was William Baxter Pickett, Jr. This is Billy Pickett. We struck him for a number of reasons, the primary one being Lynn represented his aunt in some litigation.

MR. JINKS: I sued his aunt and he pulled a gun on me.

[139] THE COURT: Any argument?

MR. WHITE: The only argument that I would make is I don't dispute that, but that is not a part of the Record in this case.

THE COURT: It is your position that Lynn should bring that up and talk to that juror about it?

MR. WHITE: I don't know if that's my position. But if that's going to be his position here now, then it should have been brought up to us prior to us having this hearing today.

[THE COURT:] If he knows something about jurors, he should sit down and go over his jury list with you and make sure you know as much about his hometown people as he does.

[MR. WHITE:] I think [that] if it is a reason that he going to bring out that is not public knowledge, answers that were given in response to voir dire.

THE COURT: Your objection is it didn't come out in voir dire and therefore it should [not] be used?

MS. CROW: There is public record he has been sued before. And we asked the question about being sued and he was [not] showing proper deference to the Court.

Our second strike was Thomas Lamar Phillips. We struck him frankly because of his demeanor every [140] day. When he came in this courtroom, he was very assertive in this courtroom. He was directing other jurors as to what to do. He was locking the door behind the jurors and

basically acting as a bailiff in this proceeding. And I don't believe that was a proper thing for him to do, and that's one of the reasons we struck him. Also Trooper Phillips has given numerous tickets to drivers of Terry Daniel's husband and made comments to them that she can get them fixed and seemed resentful of her role as a lawyer. And that was another reason we struck Trooper Phillips.

THE COURT: Argument?

MR. WHITE: As to the first part of it, I didn't notice any assertiveness on the behalf of the trooper. I think that goes to Christy's opinion of his behavior today. I didn't see anything inappropriate in his behavior. As far as him wearing his uniform, for all I know he is on duty.[1] I don't know why he would wear his uniform. I think there may be a valid explanation for that. For this court to assume because he is wearing a uniform he is being overly assertive –

THE COURT: Did anybody ask him?

MR. WHITE: I didn't ask him that.

[141] THE COURT: Anything else?

MR. WHITE: Again, the same objections I made previously as to private knowledge. It is not information that came out at voir dire.

---

[1] One of the Plaintiff's attorneys had previously raised an issue about Trooper Phillips wearing his uniform. Apparently, the initial mentioning of this issue did not make it into the record.

THE COURT: The motion is denied on Phillips. That is proper race neutral reason to strike.

Next.

MS. CROW: The next three jurors we struck were for the same reason. The first one was Maryanna May, juror number 2. She indicated her cousin, a lawyer, And we struck all of the members of the venire who had lawyers in the family. We struck number 14, Kenneth Scott, who is a black male. And we struck number 12 who is Donna Riley who previously indicated they were related but didn't indicate –

MR. JINKS: Maryanna also indicated that she was a vice president at a bank. And it is always when I am representing the plaintiff in a civil case, I always strike people that will work for insurance companies or people who are officers at banks.

THE COURT: Argument?

MR. WHITE: I would argue those are not race neutral reasons. I only recall one, if it was Ms. [142] May, who responded there was a lawyer in the family. This other person certainly did not respond that there was a lawyer in the family.

THE COURT: Donna Brooks, her. And Ms. May are cousins.

MR. WHITE: It could be one of them is related outside the conjoined family they are talking about. One who is an inlaw to one is not an inlaw to the other. I don't know that you can say [that] [t]here is a lawyer in both families.

MR. JINKS: I should also point out to the Court that Maryanna May's father is the editor of the Union Springs Herald. And the most scathing of [sic] jury verdicts I have ever read was written by her father and published in this paper in this hometown. And I think the address she gave for her residence is his address. I think she lives with her father.

THE COURT: Ms. May is a proper strike. As to Brooks –

MR. WHITE: You are talking about Donna Brooks Riley?

MS. CROW: 14 was race neutral. But he was a black male and it was the same reason because he had a lawyer in his family.

[143] MR. WHITE: I am still unsure on Donna Brooks Riley. I don't think she responded that there was a lawyer in her family. Is that the one we are arguing, that she was related to this other juror who had a lawyer in her family? My argument is we don't know what family relation that lawyer is. And simply because those two say they are related to each other doesn't necessarily mean the second juror is related to the lawyer.

MS. CROW: It is on the May side of the family. Ms. Brooks' mother was a May before she married. So the lawyer is a May on the May family side.

MR. WHITE: I would object to the people who are answering these questions are professing to have personal knowledge and yet they were not under oath during he jury venire process answering these questions and they are not under oath today.

MS. CROW: We are officers of the court.

MR. JINKS: In any case, the fact that one juror is related to another juror that we chose to strike is a race neutral reason.

THE COURT: Proper strike.

MS. CROW: Our next strike is number 6, Thomas O'Hara, Jr., because he was formerly employed with CEAC, who was involved in a great deal of [144] litigation. And he did not respond to that question when asked during voir dire.

MR. JINKS: I was one of the lawyers who sued CEAC in a number of cases, one of which was a substantial case that involved substantial loss to that company. Mr. O'Hara came here to live in Union Springs as an engineer with that company.

MR. WHITE: I don't know what that has to do with anything as far as this case goes. He also responded that he was a former client of your law firm. And how that's a race neutral reason, I don't know.

MS. CROW: It shows his inattentiveness because the question was whether you worked, formerly worked, and in fact participated in the defense of those cases.

THE COURT: I think that's a proper strike.

MS. CROW: Our last strike was Warren Elliot Streeter, a black male.

THE COURT: All right. May 7th and 8th.

MR. WHITE: Just for the Record, we would take exception to each of your rulings on these jurors.

(Whereupon the jury was seated, given the recess instruction, and dismissed until May 7, 2001.)

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

HORTON HOMES, INC.,	:	
APPELLANT,	:	**DOCKET NO: 1001714**
v.	:	***Oral Argument**
GLORIA WHEELER,	:	**Requested***
APPELLEE,	:	

ON APPEAL FROM THE CIRCUIT COURT OF BULLOCK COUNTY, ALABAMA CIVIL ACTION NO. CV-99-252

APPELLANTS' BRIEF AND ARGUMENT

(Filed Oct. 12, 2001)

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ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S *BATSON* MOTION, THEREBY ALLOWING THE PLAINTIFF TO STRIKE FIVE OUT OF FIVE WHITE VENIREMEMBERS FROM THE JURY PANEL.

The United States Constitution prohibits a prosecutor from exercising his peremptory challenges in a racially discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79,

106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Ex parte Branch*, 526 So.2d 609, 621 (Ala.1987) (interpreting *Batson* and *Ex parte Jackson*, 516 So.2d 768 (Ala.1986)).

This prohibition applies to the parties in civil cases as well. *Thomas v. Diversified Contractors, Inc.*, 551 So.2d 343 (Ala.1989); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *K.S. v. Carr*, 618 So.2d 707 (Ala.1993); *Johnson v. City of Decatur*, 686 So.2d 314 (Ala.Civ.App.1996); *Looney v. Davis*, 721 So.2d 152 (Ala.1998).

In the recent case of *Smith v. Jackson*, 770 So.2d 1068, this Court summarized the law as it pertains to the use of peremptory strikes in Alabama:

> The general rule under Alabama law is that "the party alleging a discriminatory use of peremptory challenges bears the initial burden of establishing a prima facie case of discrimination." *Looney v. Davis*, 721 So.2d 152, 164 (Ala.1998) (citing *Ex parte Branch*, 526 So.2d 609, 622 (Ala.1987). ***"After a prima facie case is established, there is a presumption that the peremptory challenges were used to discriminate on the basis of race."*** *Id.* (citing *Branch*, 526 So.2d at 623)). The burden then falls upon the party against whom the prima facie case is established to "articulat[e] a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory." *Id.* (quoting *Branch*, 526 So.2d at 623) (emphasis omitted). ***However, when the trial court orders the party against whom a Batson objection is directed to state race-neutral reasons for his peremptory challenges, "the preliminary issue***

[whether the objecting party established] a prima

* * *

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the following:

Lynn Jinks, Esq.
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By placing same in the United States mail, postage pre-paid, this the 12th day of October, 2001.

/s/ Matt White
OF COUNSEL

APPENDIX H

IN THE SUPREME COURT OF ALABAMA

HORTON HOMES, INC., Appellant,	*	DOCKET NO: 1001714
v.	*	*Oral Argument Requested*
GLORIA WHEELER, Appellee.	*	

ON APPEAL FROM THE CIRCUIT COURT OF
BULLOCK COUNTY, ALABAMA
CIVIL ACTION NO. CV-99-252

APPELLANT'S APPLICATION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF
(Filed Mar. 8, 2002)

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BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

I. THE TRIAL COURT WAS CLEARLY ERRONEOUS IN OVERRULING DEFENDANT'S *BATSON* MOTION, THEREBY ALLOWING THE PLAINTIFF TO STRIKE FIVE OUT OF FIVE WHITE VENIREMEMBERS FROM THE JURY PANEL.

The United States Constitution prohibits a prosecutor from exercising his peremptory challenges in a racially discriminatory manner. *Batson v. Kentucky,* 476 U.S. 79 (1986); *Ex parte Branch,* 526 So. 2d 609, 621 (Ala. 1987); *ex parte Jackson,* 516 So. 2d 768 (Ala. 1986). This prohibition

applies to the parties in civil cases as well. *Thomas v. Diversified Contractors, Inc.,* 551 So. 2d 343 (Ala. 1989); *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991); *K.S. v. Carr,* 618 So. 2d 707 (Ala. 1993); *Johnson v. City of Decatur,* 686 So. 2d 314 (Ala. Civ. App. 1996); *Looney v. Davis,* 721 So. 2d 152 (Ala. 1998).

The removal of even one juror for a racially discriminatory reason is a violation of the equal protection rights of both the excluded juror and the party challenging the peremptory strike. *Smith v. Jackson* 770 So. 2d 1068 (Ala. 2000); *Looney,* 721 So. 2d at 163; *Ex parte Jackson,* 640 So. 2d 1050 (Ala. 1993); *Ex parte Bird,* 594 So. 2d 676 (Ala. 1991).

In the recent case of *Smith v. Jackson,* 770 So. 2d 1068 (Ala. 2000), this Court summarized the law as it pertains to the use of peremptory strikes in Alabama:

> The general rule under Alabama law is that "the party alleging a discriminatory use of peremptory challenges bears the initial burden of
>
> * * *

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the following:

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Christina D. Crow, Esq.
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Montgomery, AL 36102-2389

By placing same in the United States mail, postage pre-paid, this the 8th day of March, 2002.

/s/ Matt White
OF COUNSEL

APPENDIX I

CV-99-252

Wheeler v. Horton Homes

Trial:
May 7 (Mon); May 8 (Tue)

	SPRING-TERM-BULLOCK CO.	B		CIRCUIT CIVIL	APRIL 24, 2001
1	Martin, Barbara Ann Jessie	D	B/F	P.O. Box 545, Union Springs, AL	
2	May, Maryanna	P	W/F	P.O. Box 715, Union Springs, AL	- ok -
3	Milbry, Vanessa M.	D	B/F	Rt. 2, Box 267A, Union Springs, AL	
4	Murry, Glenda Turner	D	B/F	Rt. 2, Box 172, Midway, AL 36053	
5	O'Brian, Angela Mae		B/F	912 Peachburg Rd., Union Springs, AL	
6	O'Hara, Thomas Joseph, Jr.	P	W/M	Rt. 4, Box 6972, Union Springs, AL	- ok -
	Owens, Renia Ann	F	B/F	Rt. 4, Box 8506, Union Springs, AL	
7	Parker, Willie James		B/M	Rt. 3, Box 83, Union Springs, AL	
8	Phillips, Thomas Lamar	P	W/M	Rt. 2, Box 530, Midway, AL	- ok -
9	Pickett, Gloria C.		B/F	P. O. Box 134, Fitzpatrick, AL	
10	Pickett, William Baxter, Jr.	P	W/M	Rt. 1, Box 79, Fitzpatrick, AL	- ok -
11	Pritchett, Juan Bernard		B/M	315 Elmwood Dr., Union Springs, AL	
12	Riley, Donna Brooks	P	W/F	Rt. 1, Box 211E1, Union Springs, AL	- ok -
13	Rivers, Shirley Ann		B/F	P. O. Box 5323, Union Springs, AL	
14	Scott, Kenneth Wayne	P	B/M	Rt. 1, Box 273, Union Springs, AL	
15	Shakoor, Ernestine Jackson	D	B/F	P. O. Box 834, Union Springs, AL	
16	Simmons, Jeffrey Lamar		B/M	P. O. Box 903, Union Springs, AL	
17	Smith, Lenita Shava	D	B/F	P.O. Box 546, Union Springs, AL	
18	Smith, Thelma Ann	A.HD	B/F	P. O. Box 5204, Union Springs, AL	
19	Sparks, Jimmy L.		B/M	Rt. 2, Box 363, Midway, AL	
20	Stewart, Regina West		B/F	Rt. 4, Box 6126, Union Springs, AL	
21	Streeter, Warren Elliott	P	B/M	305 M Avenue, Union Springs, AL	
22	Thorpe, Pamela Still	D	B/F	P. O. Box 573, Union Springs, AL	
23	Tolbert, Norcleather Jean		B/F	Rt. 3, Box 71, Union Springs, AL	
24	Tyler, Nelva Walker		B/F	P. O. Box 3, Perote, AL	
25	Williams, Robert Lee		B/M	P. O. Box 5021, Union Springs, AL	
26	Youngblood, Edward		B/M	Rt. 1, Box 241, Union Springs, AL	

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P		D	
1.	10	1.	3
2.	8	2.	4
3.	2	3.	15
4.	14	4.	17
5.	12	5.	22
6.	6	6.	1
7.	21	7.	Alt.18

APPENDIX J

Number of Status 1, 2, and 3 Members by Race

September 3, 2002

Caucasian	12754	94.5%
African-American	694	5.1 %
Other	50	0.4%
Total	13498	

Number of Status 1, 2, and 3 Members by Race and Gender
September 3, 2002

	Female			Male			
	Caucasian	African American	Other	Caucasian	African American	Other	
		*	*	*			
Bullock	3	1	0	7	1	0	
		*	*	*			